LEGAL ALERT


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I. INTRODUCTION

Pursuant to article 37 of the law of 10 August 1915 on commercial companies as amended from time to time (the “1915 Law”), shares can either be issued in registered, dematerialized or bearer form.

Due to the anonymity offered by bearer shares to the shareholders and the ultimate beneficial owners of the issuing company, bearer shares were from the outset the subject of criticism including, among others, the difficulties in the fight against money laundering and the financing of terrorism and also regarding their taxation.

Given the uncertainty regarding the shareholding of Luxembourg companies issuing bearer shares, the Financial Action Task Force (the “FATF”), in its valuation report of 19 February 2010, together with the Global Forum, asked Luxembourg to take the necessary actions in order to ensure the transparency in the shareholding of public limited liability companies (sociétés anonymes), European companies (sociétés européennes) and partnerships limited by shares (sociétés en commandite par actions) issuing bearer shares in any circumstances. During its meeting of February 2012, the FATF adopted a new version of its forty (40) recommendations and specifically the recommendation 24 dealing with bearer shares regarding the transparency of legal entities.

The interpretative note under recommendation 24 specified that the countries should take the necessary steps in order to prevent the abusive use of bearer shares by applying one of the 4 following mechanisms: (i) their outright ban, (ii) their conversion into registered shares or into shares with warrants attached (by dematerialization, for instance), (iii) their immobilisation with a financial institution or a regulated professional intermediary, or (iv) by making it mandatory for the controlling shareholdings to notify their identity to the issuing company for registration purposes.

In order to comply with the FATF and the Global Forum’s requirements in terms of identification of the bearer shareholders and of the ultimate beneficial owners, Luxembourg chose the third mechanism by adopting, on 28 July 2014, the law on the immobilisation of bearer shares and the holding of the register of registered shares and of the register of bearer shares and amending 1) the 1915 Law and 2) the amended law of 5 August 2005 on financial collateral arrangements (the “New Law”) which implements an immobilisation procedure consisting of registering the bearer shares and the identity of their holders with a professional depositary and maintaining a register of bearer shares.

The New Law was published in the Mémorial A on 14 August 2014 and entered into force three days after its publication.

2 Valuation report of the Global Forum dated August 2011: “Luxembourg must make available the information regarding the holders of bearer shares in public limited liability companies, European companies and in partnerships limited by shares, no matter the circumstances.”
II. MANDATORY DEPOSIT OF THE BEARER SHARES WITH A PROFESSIONAL DEPOSITARY OR THE IMMOBILISATION PROCEDURE

The immobilisation procedure under the New Law has three main objectives. First of all, it will facilitate the identification of the bearer shareholders by making available and accessible to the judicial and tax authorities all the information on the owners of bearer shares. It will then enable these authorities to adequately control the fight against money laundering and the financing of terrorism while maintaining the confidentiality of the personal data of the bearer shareholders towards the other shareholders and any third parties.

1. The immobilisation procedure

Pursuant to the FATF and the Global Forum’s recommendations, the New Law implements an immobilisation procedure which makes it mandatory for companies issuing bearer shares to deposit such shares with either a financial institution or a professional depositary.

a. The scope of the immobilisation procedure

The following entities incorporated under the laws of Luxembourg fall within the scope of the New Law, and are therefore required to deposit their bearer shares with a financial institution or a professional depositary:

- public limited liability companies (sociétés anonymes),
- partnerships limited by shares (sociétés en commandite par actions),
- European companies (sociétés européennes),
- investment companies (SICAF, SICAV, SICAR, SIF) incorporated as public limited liability companies (sociétés anonymes) or partnerships limited by shares (sociétés en commandite par actions), and
- mutual funds (FCP) for which the management company has issued bearer units in accordance with article 8 and 90 of the amended law of 17 December 2010 on undertakings for collective investment (the “UCI Law”) and article 7 of the amended law of 13 July 2007 on specialized investment funds (the “SIF Law”).

b. Persons entitled to be a professional depositary under the New Law

The management board of the issuing company or, in case of mutual funds, the management company must appoint the professional depositary. In the case of mutual funds, such professional depositary should be the depositary bank of the mutual fund as designated in the management regulations.
Physical persons or legal entities likely to be appointed as a professional depositary shall meet a certain number of criteria and shall, among other requirements, (a) be part of the restricted list of professions as provided for by article 42 (2) of the 1915 Law as amended by the New Law\(^3\), (b) be established professionally in Luxembourg and (c) not be a shareholder of the company issuing the bearer shares.

The entity issuing bearer shares must file an excerpt of the documents relating to the appointment and the termination of the mandate of the professional depositary with the Luxembourg Register of Commerce and Companies and publish it in the *Mémorial C, Recueil des Sociétés et Associations*. Such filing and publication requirements will enable both the judicial and tax authorities and the bearer shareholders to identify the professional depositary without having to submit a prior request to the relevant entity.

2. **Introduction of a new registration requirement for bearer shares and pledged bearer shares under the New Law**

   a. **Mandatory registration of bearer shares in a register held in Luxembourg**

Under the New Law, professional depositaries must maintain a register of bearer shares in Luxembourg including all the information necessary for the identification of the bearer shareholders, such as their identity, the number of their bearer shares, the date of their deposit, the dates of their transfer or of their conversion into registered shares\(^4\), if any.

Unlike the registered shares, the register of bearer shares is not freely accessible to all other shareholders of the issuing entity. Instead, only a shareholder registered therein may have access to its/his/her own information without ever getting access to that of the other ones.

The professional depositaries are prohibited from dispossessing themselves of the bearer shares which have been deposited with them except in four limited cases, namely (i) the termination of the mandate of the professional depositary, (ii) the conversion of the bearer shares into registered shares, (iii) the redemption of the bearer shares by the issuing entity and (iv) the depreciation of the capital, where the professional depositaries are required to hand over the bearer shares respectively to their successor or to the issuing company.

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\(^3\) a) Credit institutions, b) asset managers, c) distributors of investment funds, d) specialised professionals of the financial sector, authorised as Family Office, domiciliation agent for companies, as professional carrying out the incorporation or management services for companies, as registrars or as professional depositary of financial instruments, e) attorneys-at-law registered on lists I and IV, f) notaries, g) independent auditors (réviseurs d'entreprises) or agreed independent auditors (réviseurs d'entreprises agréés), h) chartered accountants (experts comptables).

\(^4\) Article 42(3) of the 1915 Law as amended by the New Law.
b. Specific registration requirement for the pledged bearer shares

The New Law amended article 5 (2) b) of the amended law of 5 August 2005 on financial collateral arrangements so as to provide for a specific dispossession regime for the pledged bearer shares. Indeed, the dispossession of the pledged bearer shares will be carried out, under the New Law, by means of a registration of the pledge in the margin of the registration of the financial instruments on the register of bearer shares as held by the professional depositary. The pledgee should be able to request a certificate evidencing the registration of the pledge.

   c. Consequences of the mandatory registration on the ownership and transfer of the bearer shares

Before the entering into force of the New Law, the ownership of the bearer shares was established by the sole physical possession of such shares. In addition, their transfer was carried out by a mere handing over. As a result, the company was unable to identify the bearer shareholders and their ultimate beneficial owners.

To remedy the above deficiencies and to facilitate the identification of the bearer shareholders, the New Law has amended article 42 of the 1915 Law\(^5\) so as to evidence the ownership of the bearer shares by a registration in the register of bearer shares as held by a professional depositary. Moreover, a bearer shareholder may require the professional depositary to issue a certificate evidencing the deposit of its/his/her own shares even though such certificate may not serve as evidence of the ownership of the bearer shares.

Regarding the transfer of bearer shares, the 1915 Law has been amended so as to suppress the transfer of the bearer shares by a mere handing over. From now on, the transfer of bearer shares will be carried out by a registration of such transfer in the register of bearer shares as held by the professional depositary, who/which may accept any document or notification evidencing the transfer of ownership between the assignor and the assignee.

III. SANCTIONS AND TRANSITORY PROVISIONS

1. Sanctions for non-compliance with the immobilisation procedure

In order to ensure the effectiveness of the immobilisation of bearer shares, certain civil and criminal sanctions have been set out for the management board of the issuing companies and the professional depositaries.

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\(^5\) Article 42 (4) of the 1915 Law as amended by the New Law.
a. Civil sanctions

As set out above, the management board of the issuing companies and the professional depositaries are subject to a certain number of obligations.

Failure by the management board of the issuing companies or the professional depositaries to comply with the obligations provided under the New Law may give rise to their civil liability determined in accordance with article 59 of the 1915 Law.

b. Criminal sanctions

The management board of the issuing company is subject to a fine ranging from EUR 5,000 to EUR 125,000 for deliberately (a) not having appointed a professional depositary or not having deposited the bearer shares with a professional depositary within the framework of the immobilisation procedure, (b) acknowledging the rights attached to bearer shares in violation of the provisions of article 42 (5) of the 1915 Law as amended by the New Law and (c) not having cancelled the non-registered bearer shares, reduced the share capital with the corresponding cancelled shares’ amount and deposited in escrow the corresponding amount with the Caisse de Consignation6.

The professional depositary, or if it is a legal person, its management board, is also subject to a fine ranging from EUR 500 to EUR 25,000 if it does not knowingly comply with the provisions of article 42 (3), (4) and (6) of the 1915 Law as amended by the New Law7.

2. Transitory provisions

The immobilisation procedure is also applicable to bearer shares issued before the entering into force of the New Law. Indeed, the entities (as listed above under section II. 1.a.) having issued such bearer shares before the entering into force of the New Law must appoint a professional depositary within six (6) months after the entering into force of the New Law.

The bearer shareholders have eighteen (18) months, running from the entering into force of the New Law, to deposit their bearer shares with the appointed professional depositary. In the absence of such deposit, the voting and financial rights attached to such bearer shares will automatically be suspended at the expiry of a six (6) months period and, at the expiry of the six (6) months period, the payment of dividends will be postponed until the bearer shares will have been deposited with the appointed professional depositary, provided however that the statute of limitations of five (5) years for the dividend payments will not have expired. There will be no interest payable on such dividends.

6 Article 171-2 (1) of the 1915 Law as amended by the New Law; Article 6 (6) of the New Law.
7 Article 171-2 (2) of the 1915 Law as amended by the New Law.
The bearer shares that were not deposited with a professional depositary eighteen (18) months after the entering into force of the New Law, will be cancelled and the share capital decreased accordingly.

The bearer shares will be cancelled at a price obtained by dividing the net equity of the company, calculated using a balance sheet drawn up at a date which must not be earlier than two (2) months preceding the date of the cancellation, by the number of issued shares less any non-distributable premium or reserves and all fees and expenses relating to the capital reduction deed. The corresponding sums or assets will be deposited with the Caisse de Consignation.

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